Supreme Court, U.S.
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CASE NO. 86-1364

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

MAURICE FERRE,

Petitioner,

vs.

STATE OF FLORIDA, ex rel. JANET RENO,
as STATE ATTORNEY FOR THE ELEVENTH JUDICIAL OF FLORIDA,

Respondent.

* * * * * * * * * * * * * * * * *

on Petition for Writ of Certiorari to the
Supreme Court of Florida

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Brief in Opposition to Petition for Writ of Certiorari

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STATEMENT OF THE CASE

Petitioner was at all times relevant to this case the mayor of the City of Miami. Following his reelection to office on November 10, 1981, Petitioner accepted and retained $35,000.00 in $1,000.00 post-election contributions. The contributions were obtained for Petitioner by one Ben Leon, Jr.

On November 3, 1983, the State filed a civil complaint against Petitioner and his deputy campaign manager, Maria C. Petit, alleging violations of Chapter 106 of the Florida Statutes, dealing with campaign financing. Subsequently, an amended complaint was filed. The amended complaint charged that Petitioner violated Florida Statutes §106.141(10) by accepting the $35,000.00 in contributions and that Petitioner violated Florida Statutes §106.08(2) by not returning the contributions. The complaint asked that the trial court enter an order assessing civil penalties in the amount of $1,000.00 for the violation of Florida Statutes §106.141(10) and, as provided in

Florida Statutes §106.08(5), in the amount of $70,000.00, a sum equal to twice the amount of contributions unlawfully accepted and not returned, for the violation of Florida Statutes §106.08(2).

Petitioner, by means of motion to dismiss, motion to strike and answer and affirmative defenses, challenged the constitutionality of Florida Statutes §§106.08(2) and 106.141(10). Other issues not dealt with by the present petition were also raised by Petitioner.

The court denied Petitioner's motion to dismiss and reserved ruling on the motion to strike. The State moved for summary judgment and the motion was granted. The trial court found Florida Statutes §§106.08(2) and 106.141(10) constitutional. The court imposed a $1,000.00 penalty for the violation of Florida Statutes §106.141(10). As for the violation of Florida Statutes §106.08(2), the court imposed a penalty of $35,000.00. A final judgment was entered reflecting these conclusions.

Petitioner appealed and the State cross-appealed. Florida's Third District Court of Appeal upheld the trial court's conclusion that the statutes were constitutional and affirmed the judgment against Petitioner. On the State's cross-appeal, the court found that the trial court erred in not imposing a $70,000.00 fine for the violation of Florida Statutes §106.08(2). Ferre v. State ex rel. Reno, 478 So.2d 1077 (Fla. 3rd DCA 1985).

Petitioner obtained discretionary review in the Supreme Court of Florida. That court approved and adopted the opinion of the district court of appeal. Ferre v. State, 494 So.2d 214 (Fla. 1986).

This proceeding follows.

SUMMARY OF ARGUMENT

There are numerous reasons why this Court should deny the petition for writ of certiorari.

The challenged statutes, which do nothing more than regulate the time that political candidates can receive campaign contributions, do not impact on constitutional rights since they do not interfere with the symbolic act of contributing. Moreover, since their only effect is to regulate the time for the acceptance of contributions, it is clear that even if they are deemed to impact on constitutional rights, it need only be shown that they constitute reasonable regulations in order for them to be deemed constitutional.

Thus, Petitioner's asserted reasons for arguing in support of jurisdiction, since they are predicated upon the need for a showing of a compelling governmental interest, are not appropriate matters to even consider.

Likewise, since the rights involved in campaign contributions are the rights of contributors, Petitioner, a candidate, lacks standing to raise his present claims, and for this reason also, Petitioner's asserted reasons for granting jurisdiction should not even be reached.

In any event, there exist interests that satisfy even the compelling governmental interest test.

One of these interests is the prevention of corruption and the appearance of corruption. This interest has been previously recognized as compelling by this Court. Petitioner's claim that the statutes should distinguish between large and small contributions has been waived by his failure to raise it in any lower court, is a matter of legislative, not constitutional, concern, and is without merit in light of the fact that Florida limits all contributions, regardless of when they are received.

The statutes also serve the purpose of informing the voters before an election of the identity of a candidate's contributors. This interest has also been recognized previously by this Court. The statutes under review prevent candidates from hiding the identity of unpopular supporters by simply waiting to accept contributions from such supporters until it is too late for the electorate to learn their identity.

With regard to both interests, Petitioner fails to demonstrate that the issues he raises will have any impact beyond the present case or that any confusion exists in the law. Moreover, Petitioner has not shown any basis to believe that the conclusions reached by the state courts of Florida are in any way incorrect. Thus, there is no reason to accept jurisdiction.

QUESTION PRESENTED FOR REVIEW (RESTATED)

WHETHER THIS COURT SHOULD GRANT JURISDICTION TO CONSIDER THE CONSTITUTIONALITY OF FLORIDA STATUTES §§106.141(10) AND 106.08(2), WHICH DO NO MORE THAN REGULATE THE TIME WHEN POLITICAL CANDIDATES CAN ACCEPT CAMPAIGN CONTRIBUTIONS, WHEN THERE CLEARLY EXIST COMPELLING GOVERNMENTAL INTERESTS, EVEN THOUGH IN ORDER FOR THE STATUTES TO BE DEEMED CONSTITUTIONAL, IT NEED ONLY BE DETERMINED THAT THEY CONSTITUTE A REASONABLE REGULATION OF TIME OF EXPRESSION?

ARGUMENT

The statutes in question in the present case regulate the time for the acceptance and retention by political candidates of campaign contributions. Specifically, insofar as relevant to the present case, the statutes make it unlawful to accept and retain contributions after an election.[1] They do not in any way limit the amount of contributions, nor do they in any way restrict the source of contributions.

LACK OF STANDING

Likewise, it should be realized that the statutes do not regulate the making of

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(1) Florida Statutes §106.141(10) precludes a candidate from accepting contributions after the candidate has withdrawn his candidacy, been eliminated as a candidate or elected to office. Florida Statutes §106.08(2) requires candidates to return contributions received after the above noted events, as well as contributions received on the day of an election or less than five days prior to an election. The portion of the statute relating to contributions received on the day of an election or less than five days prior to an election is not at issue in the present case, in that Petitioner was charged only with the acceptance and retention of contributions received after an election.

contributions, only their acceptance and retention. Thus, the statutes do not affect the rights of contributors. Since the First Amendment right involved in the making of a contribution is that of the contributor, Petitioner, a candidate, not a contributor, lacks standing to challenge the statutes' constitutionality. It is well-settled that the constitutionality of a statute may properly be raised only by a person whose constitutional rights are affected by the statute. See Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953). Therefore, this is not an appropriate case for review of the challenged statutes.(2)

LACK OF IMPACT ON
CONSTITUTIONAL RIGHTS

Because the statutes involved in the present case do not restrict the making of contributions by

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(2) The Florida appellate court declined to reach the standing question in light of its conclusion that the statutes were constitutional. Ferre v. State ex rel. Reno, 478 So.2d 1077, 1079 (Fla. 3d DCA 1985).

a contributor, but only their acceptance and retention by candidates, it is apparent that they do not impact on constitutionally protected rights. In Buckley v. Valeo, 424 U.S. 1, 21, 96 S.Ct. 612, 635, 46 L.Ed.2d 659, 689 (1976), this Court stated:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Since the expression protected by the First Amendment is merely "the symbolic act of contributing," the challenged statutes do no impact at all on the right. The symbolic act is equally symbolic whether the contribution is returned or converted to the candidate's own use. The contributor in either instance has expressed his beliefs by aligning himself symbolically with his

chosen candidate. While a requirement that contributions be returned has a practical impact on a candidate, it does not impact on constitutional rights. Thus, there is no need to consider whether the statutes are supported by a sufficient governmental interest and certiorari should be denied.[3]

REASONABLE REGULATION OF TIME OF EXPRESSION

This Court has made it very clear that "the government may adopt reasonable time, place and manner regulations of expression which do not discriminate against speakers or ideas, in order to further an important governmental interest unrelated to the restriction of communication." Buckley v. Valeo, supra, 424 U.S. at 18, 96 S.Ct. at 634, 46 L.Ed.2d at 687 (1976). See also

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(3) The Florida appellate court did not reach the question of whether constitutional rights were impacted in light of its finding that compelling governmental interests exist regardless of the constitutional impact. Ferre v. State ex rel. Reno, 478 So.2d 1077, 1079 (Fla. 3d DCA 1985).

Consolidated Edison Company v. Public Service Commission, 447 U.S. 529, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); Adderly v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966); Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513 (1949).

It is thus clear that Petitioner's discussion of whether there exists a compelling governmental interest to support the statutes does not deal with a relevant question and does not present a reason to grant certiorari.(4)

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(4) The Florida appellate court found that it was not necessary to consider whether to apply a test of reasonableness in that the governmental interests were so strong as to meet even the compelling interest test urged by Petitioner. Ferre v. State ex rel. Reno, 478 So.2d 1077, 1079 (Fla. 3d DCA 1985).

COMPELLING INTEREST

As noted in footnotes two, three and four, the Florida appellate court did not reach the matters previously discussed in this brief in light of its conclusion that there exist two compelling governmental interests supporting the challenged statutes. These interests are the prevention of corruption and the appearance of corruption and the goal of allowing the public to be informed before an election of the identities of persons contributing to the campaign of a particular candidate.

A

Informing the Public and Disclosure Requirements

In arguing that this Court should accept jurisdiction, Petitioner initially asserts that the goal of allowing the public to be informed before the election of the identity of a candidate's contributors has not been held by this Court to be a compelling interest.

This Court, however, has recognized the legitimacy of such an interest in upholding disclosure requirements. Buckley v Valeo, supra, 424 U.S. at 66-67, 96 S.Ct. at 657, 46 L.Ed.2d at 715. To allow a candidate to accept post-election contributions would be to allow a candidate to conceal from the electorate's evaluation the identity of unpopular supporters by having them defer their contributions until after an election.(5) Thus, the statutes here apply an interest previously identified by this Court to regulate the time in which contributions can be made in order to avoid the emasculation of clearly constitutional disclosure requirements. Therefore, this Court has at least implicitly found the

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(5) Florida law requires candidates to disclose the identities of all contributors. Florida Statutes §106.07.

interest identified by the Florida appellate court to be compelling.[6]

Even assuming, however, that this Court has not so found, it is beyond dispute that this Court has never rejected the conclusion of the Florida appellate court. Moreover, Petitioner has failed to point to any decision of any court in this country that has rejected the conclusion.

Thus, this case does not present a situation in which the law is confused or in which a decision by this Court would have more than a limited impact on one state's statutes. Further, Petitioner has demonstrated no basis to believe that the decision of the Florida appellate court is in any way incorrec

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(6) Petitioner's reliance on Federal Election Commission v. National Conservative Political Action Committee, ____ U.S. ____, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985) is misplaced. That case dealt with limitations on campaign expenditures and the portion of the opinion quoted by Petitioner was written in that context. Limiting expenditures is obviously a much greater intrusion into constitutional rights than are the regulations imposed by the challenged statutes here. Buckley v. Valeo, supra.

This Court should decline to accept jurisdiction.

B

Prevention of Corruption and the Appearance of Corruption

In Buckley v. Valeo, supra, this Court found the prevention of corruption and the appearance of corruption to be a sufficiently compelling interest to allow the government to limit the amount of money an individual can contribute to a candidate, noting that such a limitation entails only a marginal restriction upon the contributor's ability to engage in free communication. 424 U.S. at 20-21, 96 S.Ct. at 635, 46 L.Ed.2d at 688-689. Obviously, a restriction on when an individual can contribute to a candidate involves an even less than marginal restriction on that ability.

If the prevention of corruption and the appearance of corruption constituted a compelling interest sufficient to uphold the restrictions in Buckley v. Valeo, there can be no question that the less intrusive restrictions of the statutes here are also constitutional and that there is no need

for review by this Court.

Petitioner points to the fact that the statutes deal with both large and small contributions. This fact is immaterial. Florida limits the size of all contributions, regardless of when they are made. Florida Statutes §106.08(1). Thus, it would serve little purpose to distinguish among the size of contributions that are already limited to a relatively small amount.(7) Moreover, the threshhold amount of money involved in campaign limitations is a matter of legislative discretion, Buckley v. Valeo, supra, 424 U.S. at 83, 96 S.Ct. at 665, 46 L.Ed.2d at 724, and thus hardly a matter upon which to base jurisdiction. Finally, as noted with regard to the government's interest in informing the electorate of the

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(7) Petitioner accepted 35 separate unlawful contributions, each of which was for the maximum amount allowed by law, so it is doubtful that this matter is an appropriate one to be considered in the present case in any event. It should also be realized that Petitioner did not raise this claim in any lower court and has therefore waived his right to have it considered.

identity of a candidate's supporters, Petitioner's claims deal with an area of limited impact in which there is no conflict of opinions anywhere in the country and present no basis to believe that the Florida appellate court was incorrect. Plainly, Petitioner has failed to set forth a basis for the granting of certiorari.

CONCLUSION

Based upon the foregoing, the State submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Bruce S. Rogow, Nova University Law Center, 3100 Southwest 9th Avenue, Ft. Lauderdale, Florida 33315, on this the _____ day of April, 1987.

ANTHONY C. MUSTO
Assistant State Attorney